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In the Supreme Court of the United States

October Term, 1979
No. 79-1176

CITY OF MEMPHIS, ET AL.,
Petitioners,

vs.

N. T. GREENE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The October 4, 1974, "Order on Motions to Dismiss" filed by the District Court for the Western District of Tennessee, Western Division, has not been officially published, and appears in the Appendix at page 28.[1] The

1. All references to Appendices to this Brief are hereafter preceded by designation "A".

opinion of the Sixth Circuit Court of Appeals, decided May 13, 1976, reversing the October 4, 1974, district court order, and remanding the cause back to the district court, is reported at 535 F.2d 976 (6th Cir. 1976) and is printed at A. 36. The memorandum decision of the District Court for the Western District of Tennessee, Western Division, filed June 21, 1978, has not been officially published and appears at A. 146. The opinion of the Sixth Circuit Court of Appeals filed November 1, 1979, reversing the district court judgment and remanding the cause for the fashioning of appropriate injunctive relief, is reported at 610 F.2d 395 (6th Cir. 1979) and appears at A. 165. The order of the Sixth Circuit Court of Appeals denying the petitioners' petition for rehearing with a suggestion that the petition be heard by the court sitting en banc was filed December 11, 1979, and has not been officially published. It appears at A. 198.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered November 1, 1979. On December 11, 1979, the court filed an order denying the petitioners' request for rehearing with a suggestion that the petition be heard by the court sitting en banc. A petition for a writ of certiorari was timely filed with this Court and granted on May 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved in this case is the Thirteenth Amendment to the United States Constitution. This Amendment reads as follows:

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. Vol. 1 U.S.C. pg. XLVII (1964).

The federal statutory provision involved in this case is 42 U.S.C. §1982. 42 U.S.C. §1982 (1964) provides in Vol. 9 U.S.C. pg. 8020:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The Charter of the City of Memphis, Tennessee, provides on page 198 in Section 452 as follows:

The governing authorities of said City of Memphis shall have full authority to convey any property acquired by them or held by the City of Memphis not used for municipal purposes, and to give good title thereto to any purchaser. Said City shall also have power to convey any street or alley closed by it by virtue of municipal authority, and to convey good title to said street or alley as far as any title held by said City is concerned. The said City shall further have authority to close by resolution any street or alley whenever, in the judgment of the Board of Commissioners, the closing of said street or alley shall be conducive to the public welfare. (Priv. Acts 1913, ch. 163; Priv. Acts 1939, ch. 173, Section 2.)

QUESTIONS PRESENTED

1. Whether a municipality's exercise of its police powers in closing a street to through traffic in order to achieve in a residential area permissible goals of reducing the flow of traffic, enhancing safety, and reducing noise and litter, constitutes a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution, when there is no evidence that racial motivation or intent was a factor in the decision.

2. Whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment to the United States Constitution can be established without a showing of racially discriminatory intent or purpose.

STATEMENT OF THE CASE

Procedural Background

This action originated in 1974 with the filing of a complaint in the United States District Court for the Western District of Tennessee, Western Division, by N. T. Greene, and others who are no longer active participants in the lawsuit. The complaint alleged that the proposed partial closing to through traffic of a portion of a public residential street, known as West Drive, located in the City of Memphis, Tennessee, was racially discriminatory. This portion of the complaint, as amended, was dismissed by the district court upon a Motion to Dismiss filed on behalf of defendants. (A. 28).

On appeal the United States Court of Appeals for the Sixth Circuit reversed and remanded the cause on the basis that, in the court's opinion, the original plaintiff, Greene, had stated claims upon which relief might be

granted under 42 U.S.C. §1982 and 42 U.S.C. §1983. See *Greene v. City of Memphis*, 535 F.2d 976 (6th Cir. 1976). (A. 36).

In its opinion remanding the cause, the court stated in part:

> We view Greene as having stated claims under 42 U.S.C. §1982 and 42 U.S.C. §1983. §1982 confers on "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The complaint and amended complaint, construed favorably to the pleader, [citations omitted] reasonably aver that the closing confers certain benefits, to wit, the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis than similarly situated whites who "hold" their "real property" subject to having the City confer the dead-end street benefit on their property.
>
> . . . .
>
> We view Greene as having stated section 1983 claims against the Mayor and Council Chairman, those "person[s]" clearly acting "under color of . . . ordinance" and allegedly denying Greene constitutionally-guaranteed equal protection of the laws by purportedly conferring certain benefits on "white" streets, but not on "black" streets, because of the color of the residents of the streets. *Id.* at 978-79. (A. 39, 40).

After remand, intervention was allowed for plaintiffs Owens, Burse, and Cross. (A. 57). Jurisdiction in the dis-

trict court was based on 28 U.S.C. §1343 (3) and (4). (A. 82). A two-day trial was held before the trial judge without the intervention of a jury. On June 21, 1978, the district court held that the partial closing of West Drive would not violate plaintiffs' rights under either 42 U.S.C. §1982, 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, or pendent State law claims. The court set forth its findings of fact and conclusions of law in a memorandum decision. (A. 146). The trial court held, making reference to the Sixth Circuit's earlier observations,

> that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens. (A. 159).

The court further held that "there is not sufficient proof of racially discriminatory intent or purpose on the part of the City officials to establish a constitutional violation." (A. 161). The court also found that there were not any violations of the plaintiffs' rights under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

An appeal was taken to the Sixth Circuit Court of Appeals, which reversed the judgment of the district court. The cause was remanded for the fashioning of appropriate injunctive relief. (A. 165, 186).

The Sixth Circuit majority opinion concluded that the erection of a barrier at the northern boundary of West Drive constituted a badge of slavery adversely affecting the ability of the plaintiffs to hold and enjoy their property, in violation of their rights under the Thirteenth Amendment to the United States Constitution and entitling them to relief under 42 U.S.C. §1982. (A. 185).

A dissenting opinion was filed by Circuit Judge Anthony J. Celebrezze, noting that the majority opinion expanded the scope of 42 U.S.C. §1982 to an unprecedented extreme and conflicted with the well-established policy of judicial deference to legislative judgment in land use regulation. The dissenting opinion stated that a finding of discriminatory intent or purpose should be required to establish a violation under 42 U.S.C. §1982.

Petitioners asked for a rehearing with a suggestion that the rehearing be held en banc; however, since less than a majority of the judges of the court who were in regular active service favored a rehearing en banc, the petition was referred to the panel to whom the appeal was originally assigned. The original panel denied the petition for rehearing, with Judge Celebrezze again dissenting, on December 11, 1979. (A. 198). A petition for writ of certiorari was timely filed with this Court, and certiorari was granted on May 12, 1980.

Statement of Facts

On July 9, 1973, an application was filed with the Memphis and Shelby County Planning Commission by members of the Hein Park Civic Association, requesting the closing of a portion of a public residential street known as West Drive, which would make that street into a cul-de-sac. The application states that the reasons for the requested closure are to:

(1) Reduce flow of through traffic using subdivision streets.

(2) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School.

(3) Reduce "traffic pollution" in a residential area, e.g., noise, litter, interuption [sic] of community living. (A. 135; Trial Exhibit 13; Transcript, pages 19 and 148).[2]

Upon receipt of the application, the Planning Commission staff communicated with various departments of City government to learn their opinions regarding the closure. The information sought was of an advisory nature and was not controlling upon either the Planning Commission or the City Council. After receiving information from the various City departments, the Memphis and Shelby County Planning Commission recommended at its November 1, 1973, regular meeting that the closure of West Drive at Jackson Avenue be approved as submitted, with conditions relating to the providing of utility facilities and fire department clearance requirements. (A. 130; Tr. Ex. 4; TR. 19, 173-74).

The matter came on for hearing before the City Council of the City of Memphis, Tennessee, on January 29, 1974. After presentation of the proposal by Mr. Robert Miller, speaking on behalf of the Planning Commission, four persons speaking in favor of a resolution to close a portion of West Drive were heard. Seven persons spoke in opposition to the street closing, including respondent Greene. Each side was given fifteen minutes to present its views. (Tr. Ex. 26; TR 19).

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2. Hereafter, references to Trial Exhibits will be designated, Tr. Ex., followed by the appropriate number; references to pages of the Transcript will be designated TR., followed by the appropriate page number.

After the presentations were made and discussion was had among the members of the City Council, a vote was taken on the resolution to close a portion of West Drive with certain conditions, and the resolution passed. (A. 126; Tr. Ex. 1 and 26; TR 19).

On several subsequent occasions the City Council reconsidered its action, and each time voted in favor of closing a portion of West Drive to through traffic. (A. 126; Tr. Ex. 2, 27-32, and 41; TR. 19).

The closing procedure used by the City Council had never before been used to close a street that served as a thoroughfare for the residents and the public. It had, however, been used on numerous other occasions to close alleys and dedicated, but unused, streets. From that standpoint the closing procedure used by the City Council has benefited black citizens, as well as white citizens. (Tr. Ex. 33-34, 36-37, and 39; TR. 19, 257-60, 262-70).

West Drive is a two-lane residential street, beginning on the northern boundary at its intersection with Jackson Avenue and proceeding in a southerly direction to its terminus at its intersection with North Parkway, approximately one-half mile from its beginning at Jackson Avenue. Opposite West Drive on the north side of Jackson Avenue is Springdale Street, a major four-lane thoroughfare. The proposed closing was to be accomplished by means of removal of the existing curbs and installation of a curb and sidewalk parallel to the south side of Jackson Avenue. (A. 145; Tr. Ex. 13; TR. 19).

One block to the east is a street that gives straight access all the way to south Memphis and the State of Mississippi. To the west are University and McLean Streets, which are major thoroughfares offering additional access to south Memphis and to Overton Park and Snowden

School. (TR. 205-06). Access to the Hein Park Subdivision remains available on the northern side at the intersection of Jackson and Charles Drive. (TR. 205).

At the time the City Council voted to close a portion of West Drive and at the time of the trial in the district court, all of the residents along West Drive were white. During the closing argument of counsel, the district court took judicial notice that that area north of Jackson Avenue in this vicinity was predominantly black. (TR. 323-24).

SUMMARY OF ARGUMENT

The basic question before this Court is whether there can be established a violation of 42 U.S.C. §1982 and the Thirteenth Amendment without a showing or finding of racially discriminatory intent or purpose.

This Court has essentially developed two approaches concerning the elements necessary to establish a prima facie case of race discrimination—the "disproportionate impact" test, as described in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the "disproportionate impact plus intent" test, as developed by *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *City of Mobile v. Bolden*, 100 S. Ct. 1490 (1980).

The Thirteenth Amendment, which abolished slavery and involuntary servitude, empowered Congress to enforce the Amendment by appropriate legislation. Pursuant to the authority granted Congress, the Civil Rights Act of 1866 was enacted. Section 1 of this Act is now codified as 42 U.S.C. §1981 and §1982. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court upheld the constitutionality of §1982, recognizing that the enabling clause of the Thirteenth Amendment empowered Congress to pass laws necessary and proper for abolishing all badges and

incidents of slavery and, pursuant to that power, to determine what are "badges" and "incidents" of slavery. The Court further concluded that among the badges and incidents of slavery were restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 392 U.S. at 441.

In *Palmer v. Thompson,* 403 U.S. 217 (1971), the Court added that the power to define and prohibit "badges" and "incidents" of slavery exists in the enforcement power of Congress under the Thirteenth Amendment, not in the Amendment's self-executing force. As such, the Court must look to the congressional intent in enacting legislation pursuant to Section II of the Thirteenth Amendment in order to determine the definitions and prohibitions of badges of slavery.

In studying the legislative history of the Civil Rights Act of 1866, the predecessor of 42 U.S.C. §1982, it becomes abundantly clear that it was the intent of Congress to prohibit only those actions performed with a discriminatory motivation or purpose.

In looking at the two possible approaches, it is apparent from this Court's opinion in *Davis, supra,* that there is an understandable reluctance to expand the use of the disproportionate impact test of *Griggs* beyond those areas where it is clearly applicable by statute.

The Court in *Davis* held that it was not disposed to adopt the more rigorous standard of *Griggs* in applying Fifth and Fourteenth Amendment requirements to the seemingly reasonable acts of administrators and executives. The Court reasoned that any extension of the "disproportionate impact only" test beyond those areas where it was already applicable should await legislative prescription.

Section 1982, extending as it does to both public and private actions involving property, *Jones, supra,* might well precipitate many of the same consequences feared by the Court in *Davis,* if proof of discriminatory intent is not required. As evidenced by the case now before the Court, such a test can invalidate otherwise reasonable legislation or actions of a local governing body on the sole basis that they benefit or burden one race more than another.

In *Arlington Heights, supra,* the Court held that an official action by a governing body will not be found unconstitutional solely because it results in a racially discriminatory impact. In recognizing the difficulties of proof involved in such a case, the Court held that a "sensitive inquiry" is necessary into any circumstantial or direct evidence of intent. The Court therein suggested several evidentiary tests for determining such intent: . (1) the historical background of the decision, (2) the specific sequence of events leading up to the challenged decision, (3) departure from the sequence, (4) substantive departures, and (5) the legislative or administrative history.

In *Palmer, supra,* the Court once again was faced with the problem of judicially reviewing the actions of a local governing body. In upholding the decision of the City to close its pools, the Court recognized that the closings affected everyone equally, whether black or white, and that there was substantial evidence to support the City Council's decision that the pools should be closed because they could not be operated safely or economically on an integrated basis. The Court therefore found no violation of plaintiffs' rights as guaranteed by the Equal Protection Clause. The Court also dismissed plaintiffs' argument that the City's closing of the pools constituted a badge of slavery in violation of the Thirteenth Amendment.

It is the contention of Petitioners herein that the action now before the Court can no more be said to be a "badge or incident" of slavery than could the closing of pools in *Palmer*.

It is further contended by Petitioners herein that the action taken by the Memphis City Council was in the nature of a land use decision and that, consequently, much deference should be accorded to its decision. See *Arlington County Board v. Richards*, 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

In *Arlington County Board* this Court further recognized that a municipality may decide, as did the Memphis City Council herein, that a reduction of the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter, and that such a decision, in and of itself, does not violate the Constitution.

It is urged by the Petitioners herein that an approach similar to that used in *Arlington Heights* should be applied to this case. In so applying this test, based upon the record, the result should be that, while there might be a finding that the action of the City Council has a disproportionate impact on certain black citizens, which is debatable, the impact was certainly not so stark as to be found unexplainable on grounds other than race and thereby support an inference of a discriminatory purpose or intent. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), nor is there proof of a racially discriminatory intent or purpose on the part of City officials, required to establish a constitutional violation.

ARGUMENT

Introduction

The City of Memphis through its Charter clearly has the authority and power to close by resolution any street or alley when, in the judgment of the City Council, such a closing is determined to be in the best interest of the public welfare. Sec. 452 Memphis City Charter; Priv. Acts 1913; Priv. Acts 1939, Ch. 173, Sec. 2. Based upon this authority, the City has in fact developed a procedure whereby such street and alley closings may be effected. (Tr. Ex. 15; TR. 19, 145-46).

Pursuant to this street and alley closing procedure, members of the Hein Park Civic Association filed an application to close a portion of West Drive, thereby stopping the flow of through traffic. According to the record in this case, the reasons given by the association for requesting the closure were in fact reasonable and legitimate. (A. 135; Tr. Ex. 13; TR. 19). This application was processed as any other street and alley closing application had been in the past, including applications made by black citizens. (Tr. Ex. 33-34, 36-37, and 39; TR. 19, 257-60, 262-70).

The City's Planning Commission, after studying the matter, recommended to the City Council that they approve the application on the basis that a closure would help preserve the Hein Park neighborhood as a tranquil midtown subdivision. (A. 130, 121-22; Tr. Ex. 4; TR. 19, 204-05).

After a public hearing, wherein both proponents and opponents of the application were heard, the City Council approved a resolution to close the north entrance of West Drive. (A. 126; Tr. Ex. 1, 26; TR. 19).

The District Court, after considering all the evidence produced during the two-day trial of this matter, con-

cluded that the closure of West Drive would have a disproportionate impact on certain black citizens, but further concluded that there was not sufficient proof of racially discriminatory intent or purpose on the part of city officials to establish a constitutional violation. The court further found that the disparate impact was not so "stark" that a purpose or intent of racial discrimination could be inferred. (A. 161).

Despite these findings by the District Court, the Court of Appeals held that the trial court had placed too high a threshold upon the requirements of 42 U.S.C. §1982 and the Thirteenth Amendment. (A. 180). The Court of Appeals went on to hold that, based upon the trial court's own findings, the pattern of discrimination constituted a "badge of slavery", violative of plaintiffs' rights under the Thirteenth Amendment and entitling them to relief under 42 U.S.C. §1982. (A. 185).

The issue raised is whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment can be established without a showing or finding of racially discriminatory intent or purpose.

"Impact Only" Test v. "Impact Plus Intent" Test

This Court has thus far developed two approaches concerning the elements necessary to establish a prima facie case of race discrimination. Under Title VII of the Civil Rights Act of 1964, it is now settled that a plaintiff may state a cause of action by simply proving that he was damaged by the operation of an employment practice that, although neutral on its face, is shown to have a racially disproportionate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). At the same time, this Court has held that to state a claim under the Equal Protection Clause, a plaintiff must produce proof of a disproportionate

impact and an intent to discriminate. *Washington v. Davis,* 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *City of Mobile v. Bolden,* 100 S. Ct. 1490 (1980).

In *Griggs, supra,* the Supreme Court announced that Title VII forbids the use of standards that, though apparently neutral, are discriminatory in operation, unless the employer meets the burden of proving that the standards are job related. Writing for a unanimous court, Chief Justice Burger emphasized Congress' intention, as discerned from the language of Title VII, to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30.

The result is that a plaintiff alleging discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964 could prevail upon a showing of disproportionate impact alone, even without a showing of intent to discriminate.

The defendant employer had, prior to the passage of the 1964 Act, openly practiced racial discrimination in its employment practices, hiring blacks only for work in its Labor Department and not allowing blacks to work in any of its four other, higher-paying departments. Simultaneous with the passage of the 1964 Civil Rights Act, the employer initiated, for new employees seeking to work in any but the Labor Department, requirements of (1) a high school education and (2) passing scores on two aptitude tests. The Court held that Title VII was intended to remedy not only "overt" discrimination, but "practices that are fair in form, but discriminatory in operation." 401 U.S. at 431.

Though the newly-initiated requirements by the employer were racially neutral, and neither the District

Court nor the Court of Appeals had found intent to discriminate on the part of the employer, the Court felt that "artificial, arbitrary, and unnecessary" obstacles to equal employment opportunities were prohibited under Title VII. 401 U.S. at 431.

It is worth emphasizing that the holding in *Griggs* is an expression of the congressional intent, as determined from the language of the statute, to not only prevent discriminatory employment practices but to remedy past discrimination. The Court stated that, "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430. As will be shown, this contrasts with the intent of Congress in passing the Civil Rights Act of 1866, the statutory predecessor of 42 U.S.C. §1982. The Act of 1866 was designed to prevent discrimination on the basis of race in acquiring, holding, and conveying real and personal property, but was never intended and has not been interpreted to act as a remedy for past discrimination. To the contrary, the legislative history of that Act supports the requirement of an affirmative showing of racially motivated conduct before there can be a violation of the Thirteenth Amendment and 42 U.S.C. §1982.

In *Washington v. Davis, supra,* the Court made it clear that official action will not be found unconstitutional under the Equal Protection Clause solely because it results in a racially disproportionate impact.

In *Davis* several blacks, who had applied for employment as police officers and been unsuccessful because they failed a test of their verbal ability, brought a class action alleging racially discriminatory employment practices. The District Court, emphasizing that there was no

showing of intent to discriminate racially on the part of the police department and that, though a disproportionate number of black applicants had failed the test, the racial mix of the department was roughly in proportion with that of the recruiting area, held for the defendants. In reversing the District Court, the Court of Appeals applied a Title VII analysis to the alleged constitutional deprivation, holding that, once the plaintiffs had shown disproportionate impact, the burden shifted to the employer to prove the test was job-related, and that the defendants here had failed to meet this burden. The disproportionate impact was found in that a much higher percentage of blacks than whites had failed the test; other considerations, such as comparisons of the racial makeup of the department with that of the surrounding community, the Court found irrelevant.

This Court reversed. The "disproportionate impact alone" test of *Griggs* was inappropriate to the constitutional violation alleged in *Davis*. The Court declined to hold "that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 426 U.S. at 239.

> [The analysis by a Court under Title VII] involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this. *Id.* at 247-48.

After noting that the Fifth and Fourteenth Amendments serve the important purpose of preventing racial discrimination in official conduct, the Court in *Davis* ex-

pressed a concern that the furtherance of that purpose by application of the Title VII standard would be far outweighed by the concomitant disruption in the functioning of government. Application under the Equal Protection Clause of a disproportionate impact standard "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.* at 248.

Davis stands for the proposition that, to prove a constitutional violation, a plaintiff must show more than disproportionate impact alone, and that in such a case a *Griggs* rationale will not be used to shift the burden to the defendant of justifying a "seemingly reasonable" action. Further, the Court's recent decision in *City of Mobile v. Bolden, supra,* held that a showing of racially discriminatory motivation is a necessary element, not only when a violation of the Equal Protection Clause is alleged, but also when a Fifteenth Amendment violation is alleged.

Historical Background of the Thirteenth Amendment and 42 U.S.C. §1982

In an attempt to determine which of the above two approaches should be followed herein, it is necessary to first review the historical background of 42 U.S.C. §1982 and the Thirteenth Amendment.

The Thirteenth Amendment to the United States Constitution was ratified December 18, 1865, and consists of two sections. Section 1 states:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 states:

> Congress shall have power to enforce this article by appropriate legislation.

In essence, the Thirteenth Amendment in Section 1 abolished slavery and involuntary servitude, and in Section 2 gave Congress the power to enforce the amendment. The attitude of the legislators at the time was that the objective was to abolish slavery, not only in name but in fact, and to entrust Congress with the responsibility to enforce these provisions making all persons free.[3]

Pursuant to the authority granted Congress by Section 2, the Civil Rights Act of 1866 was enacted. Section 1 of the Act states:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory, in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefits of the law and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

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3. See *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1, 15 (1974), referring to statements made by Senator Trumbull, CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

Section 1 of the Civil Rights Act of 1866 later became enacted as 42 U.S.C. §1981 and 42 U.S.C. §1982. Section 1982 in its present form reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The modern view of the Thirteenth Amendment and 42 U.S.C. §1982 is stated in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), wherein the Court, in upholding the constitutionality of §1982, explained that, while the Thirteenth Amendment abolished slavery and established universal freedom, the enabling clause of that Amendment also empowered Congress to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. The Court further stated that, under the power granted by the Thirteenth Amendment, Congress has the power rationally to determine what are the badges and incidents of slavery and the authority to translate that determination into effective legislation. 392 U.S. at 439-40.

From this analysis, the Court concluded that among the badges and incidents of slavery were restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 392 U.S. at 441, quoting from *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

This Court has further expanded the use of the badge of slavery analysis in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973).

In line with this discussion, the question of the Thirteenth Amendment's self-executing force must be men-

tioned, although this question apparently is not properly before this Court.[4] In *Palmer v. Thompson,* 403 U.S. 217 (1971), the Court confronted this question and indicated that the self-executing force of the Thirteenth Amendment should be tightly confined.

In *Palmer* the City of Jackson, Mississippi, had closed its public swimming pools, which had previously been operated on a racially segregated basis, purportedly because the pools had been operated in previous years at a considerable loss to the city, and the city council felt that operating them on an integrated basis would only increase the financial loss to the city, as well as provide an opportunity for racial friction and possible disturbances. Petitioners brought an action to force the reopening of the pools on an integrated basis.

Petitioners argued that the city's closing of city-owned swimming pools imposed on black citizens of Jackson, Mississippi, a badge of slavery prohibited under the Thirteenth Amendment. After characterizing this argument as "faint and unpersuasive," the Court stated therein that "to reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history." 403 U.S. at 226.

The Court went on to reaffirm the *Jones* holding that Congress, under Section 2 of the Thirteenth Amendment, does have a broad power to "outlaw badges of slavery," but it noted that Congress had passed no law under that power to regulate a city's opening or closing of swimming pools. The Court recognized that, in the absence of such congressional legislation, for this Court to label such an

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4. In the majority opinion of the Court of Appeals the Court notes that they do not reach the question whether relief could be predicated directly on the Thirteenth Amendment. (See footnote 8 at A. 186).

action as a badge of slavery would give the Court "a law-making power far beyond the imagination of the amendment's authors." 403 U.S. at 227. The Court thus rejected the petitioners' badge of slavery contention, while at the same time affirming the importance of looking to the legislative intent in questions of statutory interpretation.

In so deciding, the Court made it clear that the power to define and prohibit badges and incidents of slavery exists in the enforcement power of Congress under the Thirteenth Amendment and not in the Amendment's self-executing force. The Court must therefore look to the Congressional legislation enacted pursuant to Section 2 of the Thirteenth Amendment to determine the definitions and prohibitions of badges of slavery.

Legislative History of the Civil Rights Act of 1866

To determine whether a violation of 42 U.S.C. §1982 and the Thirteenth Amendment can be established without a showing of racially discriminatory intent or purpose, attention must be directed to the intent of the legislators of the Civil Rights Act of 1866. There is no doubt that such legislative intent is the primary test for statutory interpretation.[5]

In studying the legislative history of the Civil Rights Act of 1866, it becomes abundantly clear that it was the intent of Congress to prohibit only those actions performed with a discriminatory motivation. The Congress at that time was concerned with securing to blacks the status of citizenship and the basic rights attached thereto. The Act

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5. R. Berger, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 136-37 (1977), citing *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *U. S. v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845); and *U. S. v. Babbitt*, 66 U.S. 55, 61 (1861).

was meant to deal with the most obvious racially discriminatory conduct and was not designed to attack more subtle discrimination."

Senator Trumbull, the chairman of the Judiciary Committee and the bill's leading proponent, had cited examples of various state laws which had been enacted to discriminate against blacks in the exercise of their civil rights. Trumbull emphasized the need for "machinery to carry it [the Thirteenth Amendment] into effect." The "Black Codes," to which he referred,

> although they do not make a man an absolute slave, yet deprive him of the rights of a freeman . . . [and] a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void. CONG. GLOBE, 39th Cong., 1st Sess., 475 (1865).

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6. Even a proponent of application of a disproportionate impact only standard in §1981 and §1982 actions states that, "The Acts [of 1866 and 1870] were meant to deal with the most egregious forms of reactionary white conduct. . . . Even if it is accepted that the legislative history of the two Acts supports the Supreme Court's view [in *Jones*] that these laws were intended to regulate private behavior, it cannot seriously be argued that that legislative history also supports the contention that Congress meant these laws to outlaw any conduct with unintended racially disproportionate effects upon contracts. A reading of the relevant congressional debates reveals absolutely nothing that would lend credence to such a notion. On the contrary, these sources give every indication that these laws were intended only to outlaw those actions undertaken with invidious, discriminatory motivation." *Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L.J. 1267, at 1279-80. Also see *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?*, 1978 B.Y. L. Rev. 1030, at 1046-48.

Trumbull felt that the language of the Thirteenth Amendment prohibited all such racially discriminatory statutes, but that some legislative command was required to effectuate that intent. "The purpose of the bill under consideration [the Act of 1866] is to destroy all these discriminations and to carry into effect the constitutional amendment."[7]

However, even the proponents of the Act of 1866 did not conceive that the bill would remedy unintentionally discriminatory laws which might have a disparate impact on one race or another. Senator Trumbull stated, in response to a question concerning possible unintentional violations of the statute, that a violation would require "a union of act and intention." *Id.* at 477.

This Court in a dictum in *Jones v. Alfred H. Mayer Co., supra,* noted that the intent of Congress in passing Section 1 of the Civil Rights Act of 1866, as derived from a reading of the statute, was to prohibit *"all racially motivated* deprivations of the rights enumerated in the statute." 392 U.S. at 426 (emphasis added to "racially motivated"). The Court also stated its conclusion based upon the congressional history and the language of 42 U.S.C. §1982, that §1982 "encompass[es] every *racially motivated* refusal to sell or rent." *Id.* at 421-22 (emphasis added). While the *Jones* case did not address specifically the question of whether racially discriminatory intent is a necessary ingredient in a case involving the Thirteenth Amendment and 42 U.S.C.

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7. CONG. GLOBE, 39th Cong., 1st Sess., 474 (1865). The bill's opponents argued that the Thirteenth Amendment should be more narrowly construed. Senator Saulsbury stated that, "The operation, the effect of that amendment [the Thirteenth] is simply to say that a person who heretofore was a slave of another shall be no longer his slave, and it operates no further. It bestows no rights further than to relieve him from the burdens of servitude and slavery. A man may be a free man and not possess the same civil rights as other men." CONG. GLOBE, 39th Cong., 1st Sess., 477 (1865).

§1982, the above-cited language seems to indicate the necessity, based upon both the congressional history and the clear language of the statute, for a showing of racial motivation in a §1982 case.

In looking at the two possible approaches, *i.e.*, the disproportionate impact test used in *Griggs v. Duke Power Co., supra,* or the test in *Washington v. Davis, supra,* and *Arlington Heights v. Metropolitan Housing Corp., supra,* it is apparent from this Court's opinion in *Davis* that there is an understandable reluctance to expand the use of the disproportionate impact test used in *Griggs* beyond those areas where it is clearly applicable by statute.

The Court in *Davis* recognized that "[u]nder Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved." 426 U.S. at 247.

The Court therein held, however, that they were not disposed to adopt the more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments to the seemingly reasonable acts of administrators and executives. The Court stated that extension of the rule beyond those areas where it was already applicable should await legislative prescription. *Id.* at 247-48.

With this reasoning in mind, petitioners urge the Court to confirm that the disproportionate impact test should not be expanded without a legislative direction to do so. Such a legislative command is certainly lacking in the case at hand. The provisions of §1982 give no indication that such a test should be applied, and, to the contrary, the legislative history of that statute indicates that a showing of racial motivation was intended by the Congress to be a necessary element.

Section 1982, extending as it does to both public and private actions involving property, might well precipitate many of the same consequences feared by the Court in *Davis* if proof of discriminatory intent is not required. As evidenced by the case now before the Court, such a test can invalidate otherwise reasonable legislation or actions of a local governing body on the sole basis that they benefit or burden one race more than another. The ramifications of this upon a local governing body, without further instructions from this Court as to what constitutes a badge of slavery under the Thirteenth Amendment and §1982, could be paralyzing. Such a standard would virtually prohibit any legitimate municipal act which has a disparate impact upon either race.

The *Arlington Heights* Approach

In *Arlington Heights v. Metropolitan Housing Corp., supra,* the Metropolitan Housing Development Corporation (MHDC), a non-profit developer, contracted to purchase a tract of land within the boundaries of the Village of Arlington Heights in order to build racially integrated, low and moderate income housing. MHDC applied to the village for the necessary rezoning. Pursuant to the application for rezoning, the Village Commission held a series of public meetings wherein the pros and cons of the rezoning were discussed. After such meetings were held, the Village Plan Commission denied the requested rezoning. MHDC and others brought suit alleging that the denial was racially discriminatory and violated the Equal Protection Clause of the Fourteenth Amendment.

The Court, in rejecting the equal protection claim, stated that:

> official action will not be held unconstitutional solely because it results in a racially disproportionate impact.

> "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Arlington Heights*, 429 U.S. at 264-65, quoting from *Washington v. Davis*, 426 U.S. at 242.

This Court in so ruling recognized that legislators and administrators, who are called upon to make such decisions, are necessarily concerned with balancing numerous competing considerations and that, as such, the courts should refrain from reviewing the merits of their decisions absent a showing of arbitrariness or irrationality.

The Court, however, reasoned that racial discrimination cannot be one of those competing considerations; therefore, when there is proof that a discriminatory purpose has been a motivating factor in that decision, such judicial deference is no longer justified.

The Court further recognized that, when dealing with decisions of local governing bodies, such a discriminatory purpose is often difficult to discern. In recognizing the difficulties involved in such a case, the Court held that a "sensitive inquiry" is necessary into any circumstantial or direct evidence of intent as may be available. Several evidentiary sources for determining the intent were mentioned: (1) the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes," (2) the specific sequence of events leading up to the challenged decision, (3) departure from the usual procedural sequence, (4) substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and (5) the legislative or administrative history, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 266-68.

Of the two tests we have discussed thus far, the one most applicable to the case now before the Court would appear to be that used in *Arlington Heights*. The types of actions taken by the Village of Arlington and the City of Memphis appear to be very similar in nature. The complaints made by the plaintiffs in each case, while relying upon different constitutional sections, appear to be alleging the same sort of discriminatory action.[8] The policy considerations involved in *Arlington Heights* for requiring a showing of more than just a disproportionate impact would appear to be identical to those present herein. As such, petitioners urge this Court to apply the same or a similar approach to the case now before it.

It is also worth noting that this was the test which was used by the District Court below in rendering its decision. Based upon this test and the inquiry suggested by *Arlington Heights*, the District Court found that there was not sufficient proof of racially discriminatory intent or purpose upon the part of the city officials to establish a constitutional violation.

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8. Petitioners feel that requiring a showing of discriminatory intent when a violation of the Thirteenth Amendment and 42 U.S.C. §1982 is alleged is consistent both with the legislative intent and the rationale in *Davis*, in not looking behind the seemingly reasonable acts of legislators and administrators. Though the Sixth Circuit Court of Appeals, in its majority opinion in *Greene v. City of Memphis*, 610 F.2d 395 (1979), seemed to indicate either that a showing of intent was not required or that intent could be inferred from a lesser showing than that suggested in *Arlington Heights*, the court went on to cite a number of cases, apparently as authority for its "badge of slavery" conclusion. 610 F.2d at 403-04, quoting from Justice Douglas' concurring opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445-46. The cases cited, though, were almost all decided upon the Fourteenth Amendment, not the Thirteenth. This indicates to petitioners that no less a showing of intent should be allowed in Thirteenth Amendment and §1982 cases than has been required by the Court when a Fourteenth Amendment violation has been alleged.

In *Palmer v. Thompson, supra,* while a main thrust of the opinion is directed to whether the action of the City of Jackson in closing public pools constituted a violation of the Equal Protection Clause, the Court once again had to battle with the concept of reviewing the actions of a local governing body which is faced with making difficult daily decisions concerning local matters.

This Court, after finding that there was "state action" in the closing of the pools and, therefore, a potentially valid cause of action under the Fourteenth Amendment, distinguished the fact situation from cases in which "whites are permitted to use public facilities while blacks are denied access" and those in which "a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities." 403 U.S. at 220.

Petitioners alleged that the reasons cited by the city council for closing the pools were spurious and that the real reason was that the council was impermissibly trying to retain some of the vestiges of segregation by refusing to operate the public pools on an integrated basis.

This Court declined to look behind the expressed motives of the legislating body, stating that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." The Court further stated that it would be "extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." *Id.* at 224.

In sustaining the action of the City of Jackson's closing of the city pools, the Court noted: (1) that the pools would be closed to everyone, whether black or white, and the effect of such closings would be the same upon whites and blacks; and (2) that there was substantial evidence

to support the city council's decision that the pools should be closed because they could not be operated safely or economically on an integrated basis.

Justice Burger in a concurring opinion wrote:

> To hold . . . that every public facility or service, once opened, constitutionally "locks in" the public sponsor so that it may not be dropped [reference omitted] would plainly discourage the expansion and enlargement of needed services in the long run.
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> . . . .
>
> We would do a grave disservice, both to elected officials and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to a microscopic scrutiny for forbidden motives rendering the decision unconstitutional. *Id.* at 228.

Along this same line, it has been argued by the petitioners from the very beginning of this action that the reasoning used by this Court in *Palmer* should apply to the present case. It is certainly evident that the closing of West Drive as a through street, thereby blocking traffic from the north, prohibits whites as well as blacks from entering West Drive from the north, thereby affecting both black and white drivers equally. As such, there is no constitutional violation.

The petitioners in *Palmer* raised, in addition to the equal protection claim, the allegation of a violation of petitioners' rights under the Thirteenth Amendment. The Court restated petitioners' argument thusly:

> The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, . . . this Court should declare that the city's closing of the pools to keep the

> two races from swimming together violates the Thirteenth Amendment. *Id.* at 226.

This Court declined to extend the language of the Thirteenth Amendment to encompass the above-summarized fact situation, affirming that the framers of the Amendment did not intend such an expansive application for it, and refused to hold that the pool closings came within the definition of "badge or incident" of slavery.

Petitioners in the action now before the Court feel that the denial of access to vehicular through traffic on West Drive to black citizens and white citizens alike, after arguments for and against the street closing, after thoughtful consideration by the City Council, and through lawful proceedings of the local government, can no more be said to be a "badge or incident" of slavery than could the closing of the city pools in *Palmer*.

Land Use Decisions

In looking at the specific action taken by the City Council herein, it is apparent that it was in the nature of a land use decision. While it may be true that the closing of West Drive was not taken in response to any uniform planning effort throughout the City, as noted in the Court of Appeals majority opinion, one of the objectives of the action was to help preserve the Hein Park Subdivision as a midtown residential section. This Court has long been of the opinion that much deference should be accorded to such matters concerning land use regulations. See *Arlington County Board v. Richards*, 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

In both *Village of Belle Terre* and *Euclid*, this Court recognized that land use regulations enacted by local

governing bodies may strive to create quiet places free from disturbing noises and increased traffic, as opposed to being confined to the elimination of filth, stench, and unhealthy places. In the case now before this Court, it appears from the record that the petitioner attempted to do no more than create just such a tranquil atmosphere.

In the recent case of *Arlington County Board*, this Court further recognized the authority of a municipality to decide, as did the Memphis City Council herein, that restriction of the flow of outside traffic into particular residential areas would enhance the qualify of life there by reducing noise, traffic hazards, and litter. The Court, while recognizing that such an action would indeed discriminate against non-residents of the affected areas, held that the Constitution does not outlaw such beneficial, social, and environmental objectives, nor does it presume distinctions by the local government between residents of a local neighborhood and non-residents to be invidious.

It would appear that the objectives, both of the applicants in requesting to close West Drive and of the City Council in passing the resolution authorizing the closure, are similar to those objectives mentioned in *Arlington County Board*. It would further appear that, while the restricting of through traffic on West Drive arguably would discriminate between residents and non-residents, absent any proof of racial motivation on the part of the City Council there should be no finding of a constitutional violation.

Analysis

With the above argument in mind, petitioners urge that an approach similar to that used in *Arlington Heights*, *supra*, and applied by the District Court herein, should be applied in this case.

In so applying this test, it becomes apparent from a study of the record herein that, even if it can be said that the action taken by the City Council has a disproportionate impact on certain black citizens, which is debatable, that impact certainly is not so stark as to support an inference of a discriminatory purpose or intent. Such an inference can only be made in extreme situations, in which the disproportionate impact is "unexplainable on grounds other than race," such as those depicted in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).[9]

Further, there is not sufficient proof in the record to support a holding of racially discriminatory intent or purpose on the part of city officials and thereby establish a constitutional violation, based upon the considerations suggested by *Arlington Heights, supra*. In the case at bar, neither the historical background of this decision nor

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9. The case presently before the Court is clearly distinguishable from *Yick Wo v. Hopkins* and *Gomillion v. Lightfoot*.

In *Yick Wo* the Court found that a racially neutral city ordinance requiring that laundries be operated only in buildings of brick or stone, except where special permission had been granted by the board of supervisors, had been applied discriminatorily, in that all of the city's Chinese laundry-owners who had petitioned, approximately 200 of them, and only one non-Chinese had been denied permission to continue operating their businesses in wooden buildings.

The Court found these facts so patently discriminatorily motivated that it felt that racial motivation was as much as admitted by the defendant. Defendants offered "[n]o reason whatever, except the will of the supervisors," for the disparate treatment.

In *Gomillion* the Court held that the lower court's granting of a motion to dismiss for failure to state a claim was unwarranted. From plaintiffs' allegations of discrimination and the fact that the defendants had transformed the boundaries of the city from a square into an "uncouth twenty-eight-sided figure," thereby resulting in the removal from the city of all but four or five of its 400 black voters and none of its white voters, the Court found that plaintiffs had stated a claim that, *if "uncontradicted or unqualified,"* (emphasis added) would almost necessitate a finding of discriminatory intent.

the specific sequence of events leading up to the challenged decision lend any support to a finding of racial intent.

From the recorded transcripts of the several public hearings before the City Council concerning the proposed street closing, it is apparent that the matter was openly debated and thoughtfully considered on its merits. There is no evidence of the Council's having any racial purposes in closing the street. A reading of the record further shows that the Council's main concern was over the effect this closure would have on traffic, both along West Drive and in the surrounding area.

The evidence clearly indicates that the street and alley closing procedure had been used to close alleys and dedicated but unused streets for the benefit of black citizens as well as white citizens. While the proof shows that the closing of West Drive was the only instance in which the street and alley closing procedure had been used to close a street which had served as a thoroughfare for residents and the public, that fact, without more, should not constitute proof of racially discriminatory intent.

It should further be stressed that the closing of West Drive was at its northern end, not because it represented the precise point of a separation between two neighborhoods, as suggested by the Court of Appeals in its majority opinion, but because that is the point where a major four-lane thoroughfare funnels into a two-lane residential street.

CONCLUSION

From such an analysis, it is apparent that there can be no finding of an intent or purpose to racially discriminate based upon the *Arlington Heights* approach. As such, petitioners request this Court to reverse the decision of the Court of Appeals and affirm the holding of the District Court below.

Respectfully submitted,

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